

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re

DAVID LEE WEST,

Debtor.

No. 95-21524
Chapter 7

SARAH JO WEST,

Plaintiff,

vs.

Adv. Pro. No. 96-2003

DAVID LEE WEST,

Defendant.

M E M O R A N D U M

APPEARANCES:

RUSSELL D. MAYS, ESQ.
128 South Main Street, Suite 101
Greeneville, Tennessee 37743
Attorney for Sara Jo West

ROBERT PAYNE CAVE, ESQ.
104 North College Street
Greeneville, Tennessee 37743
Attorney for David Lee West

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This is an action seeking a nondischargeability determination under 11 U.S.C. §§ 523(a)(5) and (a)(15) upon certain debts which arose from a marital dissolution agreement incorporated into a final decree of divorce entered by the Chancery Court for Hawkins County, Tennessee on April 4, 1994. Pending before the court is the motion for summary judgment filed by defendant, David Lee West, on August 16, 1996, asserting that there is no genuine issue as to any material fact and that he is entitled to a judgment as a matter of law, and the response in opposition thereto of plaintiff, Sara Jo West, filed on August 30, 1996. Also before the court is a motion for summary judgment filed by the plaintiff on September 10, 1996, asserting that there is no genuine issue as to any material fact and that she is entitled to judgment as a matter of law. For the reasons set forth below, the court finds that both motions for summary judgment should be denied. This is a core proceeding. 28 U.S.C. § 157(b)(2)(I).

I.

Fed. R. Civ. P. 56, as incorporated by Fed. R. Bankr. P. 7056, mandates the entry of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In ruling on a motion for summary judgment, the inference to be drawn from the underlying facts contained in the record must be viewed in a light most favorable to the party opposing the motion. See *Schilling v. Jackson Oil Co. (In re Transport Associates, Inc.)*, 171 B.R. 232, 234 (Bankr. W.D. Ky. 1994), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986). See also *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989), rehearing denied (1990). Both parties have filed affidavits and the court has before it the pleadings of the parties which reference the pertinent decree of divorce.

II.

The complaint recites that prior to their divorce in April 1994, the parties entered into a martial dissolution agreement which, *inter alia*, provided for the division of martial debt. Specifically, plaintiff alleges that the defendant was required to pay and hold the plaintiff harmless for the indebtedness to First Tennessee Bank, secured by a 1994 Dodge Shadow, and the unsecured indebtedness owed to Takoma Hospital and Takoma Medical Group, and also pay the 1993 real property taxes owed on the parties' former martial dwelling place. Plaintiff alleges

that the "payment of these debts by the Defendant were intended to and actually operated as support and maintenance for the Plaintiff and the parties' minor children, and therefore, constitute support as [e]nvisioned by § 523(a)(5) of the Bankruptcy Code." In the alternative, the plaintiff requests a finding that the debts are nondischargeable pursuant to 11 U.S.C. § 523(a)(15) since plaintiff alleges that they were "incurred in the course of a divorce or separation and also the debts are subject of a divorce decree" and the defendant "has the ability to pay these debts as [e]nvisioned by § 523(a)(15)(A)"

The defendant admits the allegations concerning the execution of the marital dissolution agreement and its provisions. However, the defendant denies that the assumption of "debts were intended to and actually operated as support and maintenance for the Plaintiff and the parties' minor children, but were simply a division of property rather than being in the nature of alimony, maintenance or support." Defendant also denies that he has "the ability to pay such debts from income or property of the debtor not reasonably necessary to be expended for his maintenance or support" and avers "that discharging the debt would not result in a benefit to the debtor that outweighs the detrimental consequences to his former spouse or his minor

children."

III.

11 U.S.C. § 523(a)(5) provides in pertinent part that a discharge under § 727 does not discharge an individual debtor from any debt:

to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, ... but not to the extent that ...

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

Accordingly, the threshold question is whether the assumption of the various indebtedness by the defendant was intended to be and actually is in the nature of support, maintenance or alimony. In making such a determination, the court must utilize the test set forth in *Long v. Calhoun* (*In re Calhoun*), 715 F.2d 1103 (6th Cir. 1983), as modified in *Fitzgerald v. Fitzgerald* (*In re Fitzgerald*), 9 F.3d 517 (6th Cir. 1993). Of course, the burden of demonstrating that the obligations are in the nature of support and alimony rests with the plaintiff, the nondebtor spouse. See, e.g., *Chism v. Chism* (*In re Chism*), 169 B.R. 163, 168 (Bankr. W.D. Tenn. 1994).

In *Calhoun*, the Sixth Circuit Court of Appeals presented a four-step analysis to assist courts in determining the true nature of such obligations. First, the court has to determine if the state court or the parties intended to create support obligations. Second, the court must determine whether the obligations have the actual effect of providing necessary support, a so-called "present needs" test. Third, the court must determine if the obligations are so excessive as to be unreasonable under traditional concepts of support. And fourth, if the amounts are unreasonable, the obligations are dischargeable to the extent necessary to serve the purposes of federal bankruptcy law. *Id.* at 1109-10.

In this case, the defendant disputes that the various obligations are in the nature of alimony, maintenance or support. The ground for his summary judgment motion is that the martial dissolution agreement "speaks for itself" and "clearly shows that the debts were not intended to be in the nature of alimony, maintenance or support." The affidavit of the defendant likewise recites that the debts to be paid by him under the martial dissolution agreement "were never intended to be in the nature of alimony, maintenance and support; but were strictly an assumption of certain martial debts and were intended to be a division of property."

On the other side, the plaintiff contends that the "intent of the parties herein was to create a support obligation as there were specific discussions regarding the subject debts including acknowledgment by each party of the Plaintiff's inability to support the children of the parties and herself should she have the burden of paying the subject debts." The plaintiff states in her affidavit that the "debts which are the subject of this adversary proceeding were intended and expected to operate as maintenance and support as the Defendant and I had detailed discussions regarding [m]y inability to pay these debts and simultaneously support myself and our children." The plaintiff has tendered a cassette recording of the defendant's 11 U.S.C. § 341(a) meeting of creditors which purportedly contains admissions in this regard. No transcript of that recording has been offered for the court's consideration.*

Because of this conflict in the parties' positions and affidavits, the court must apply the *Calhoun* test, which requires an evidentiary hearing. Neither the defendant's argument that the language of the marital dissolution agreement

*The court also questions whether such testimony even if properly transcribed and authenticated may be considered as direct evidence in support of plaintiff's position. See *In re Kincaid*, 146 B.R. 387, 389 (Bankr. W.D. Tenn. 1992) ("Testimony of debtors at a bankruptcy meeting of creditors is not admissible as direct evidence in a latter adversary proceeding or contested matter.").

conclusively evidences the intent of the parties to not create support obligations by the assumption of the indebtedness at issue, nor the plaintiff's argument that the defendant has acknowledged the plaintiff's need of support ends this court's inquiry. See *In re Chism*, 169 B.R. at 169. See also *Joseph v. O'Toole (In re Joseph)*, 16 F.3d 86, 88 (5th Cir. 1994)(a label placed upon the obligation by the consent agreement or court order which created it will not determine its subsequent dischargeability in bankruptcy).

Moreover, even if the court were to conclude that the assumption of the various debts by the defendant does not create a support obligation, that does not mean that the debts are dischargeable. By the Bankruptcy Reform Act of 1994, Congress augmented the dischargeability provisions of § 523(a)(5) by adding § 523(a)(15), which now though their cooperative effect make all-divorce related obligations potentially subject to a determination of nondischargeability in bankruptcy. See *Robinson v. Robinson (Matter of Robinson)*, 193 B.R. 367, 372 fn.1 (Bankr. N.D. Ga. 1996). Section 523(a)(15) provides that a discharge under § 727 does not discharge an individual debtor from any debt:

not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation

agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless—

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

11 U.S.C. § 523(a)(15) has been timely pled by plaintiff in this adversary proceeding and the defendant has denied that the debts are nondischargeable thereunder. Since there is also a genuine issue to material facts in dispute concerning this issue, the court must deny the motions for summary judgment for this reason as well.

An order will be entered in accordance with this memorandum opinion.

FILED: September 12, 1996

BY THE COURT

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE